Supreme Court, U.S.
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No. 96-2005

In The

Supreme Court of the United States

October Term, 1996

THE STATE OF TEXAS,

Petitioner,

vs.

KERRY MAX COOK,

Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The Smith County prosecutors have been less than candid with the Court. They neglect to reveal that the prosecution obtained Kerry Max Cook's 1978 conviction and death sentence through perjured testimony and the suppression of substantial evidence favorable to the defense.[1]

Smith County also misstates the facts regarding Mr. Cook's second trial in 1992. While the Smith County prosecutors incorrectly claim that a mistrial resulted when the jury hung 6-6 for murder and capital murder, in truth, the jury deadlocked six for *acquittal* and six for conviction.[2]

In reversing Respondent's conviction from his third trial in 1994, the Texas Court of Criminal Appeals acknowledged the substantial and systematic misconduct which has plagued this case for over a fifteen year period — "Prosecutorial and police misconduct has tainted this entire matter from the outset". *Cook v. State*, 940 S.W. 2d 623, 627 (Tex. Crim. App. 1996). The Texas Court of Criminal Appeals then specifically set forth some of the instances of prosecutorial misconduct:

> The Smith County District Attorney's Office suppressed exculpatory evidence that a third party had threatened to kill the deceased shortly before the murder. *Id.* at 625.

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1. Shortly after the subornation of perjury was exposed, the lead prosecutor took his own life.

2. Misstating the circumstances of the mistrial is not the only instance where the Smith County prosecutors have been fast and loose with the facts. They claim in their Petition for Writ of Certiorari that Mr. Cook had escaped during two commitments to mental institutions and additionally had been a fugitive. While these assertions suit Smith County's purposes, they are not supported by the record and are, simply put, false and misleading.

The Smith County District Attorney's Office suppressed exculpatory evidence that the Tyler, Texas Police Department had information that the third party who had threatened to kill the deceased shortly before the murder was mentally and emotionally unstable and a pathological liar. *Id.* at 625-626.

The Smith County District Attorney's Office purchased, with a secret plea bargain not revealed to defense counsel, the fabricated testimony, of a career criminal charged with murder, that Respondent had made a purported jail house confession. *Id.* at 626.

Although the Smith County District Attorney's Office made a secret deal for the fabricated testimony of Respondent's jail house confession, the Smith County prosecutors falsely told the jury during final arguments that the State had made no deal to procure the witness' testimony. *Id.* at 626.

The Smith County District Attorney's Office intentionally suppressed exculpatory evidence that Respondent had met the victim and had been a guest in her apartment several days before the murder. After suppressing this evidence, the prosecutor's presented the theory at trial that Respondent and the deceased were total strangers and that Respondent had never been to her apartment until the time of the murder. *Id.* at 626.

The Smith County District Attorney's Office intentionally suppressed exculpatory evidence that a key state's witness had given prior statements to the district attorney's office which directly contradicted the witnesses' trial testimony. *Id.* at 626.

The Smith County District Attorney's Office pressured a police officer to give false and misleading testimony that the latent fingerprints found on the victim's door were six to twelve hours old when lifted the morning after the murder. *Id.* at 626.

A Smith County prosecutor purposely went to the Smith County Jail and initiated contact with Respondent, behind the back of defense counsel, and conducted custodial interrogation. *Id.* at 626.

STATEMENT OF FACTS

Smith County's suppression of impeachment evidence favorable to the Respondent is one aspect of the substantial prosecutorial misconduct found by the Texas Court of Criminal Appeals. The Texas Court noted that Robert Hoehn was a "key prosecution witness" and that "Hoehn's testimony was crucial as it placed Respondent near the scene of the murder in an aroused, emotional state at the time of its commission." *Id.* at 626, 627. Robert Hoehn died after Respondent's first trial. Smith County therefore employed the former testimony exception to the hearsay rule to introduce Hoehn's testimony from the first trial at Respondent's second and third trials.

Although Hoehn was a "key prosecution witness", the Texas

Court of Criminal Appeals acknowledged that the Hoehn's "highly prejudicial testimony" at trial was "directly contradicted" by his earlier grand jury testimony and his statements to the police. *Id.* at 626, 627. The Respondent was precluded from investigating the contradictions and confronting Hoehn with them, however, because the Smith County District Attorney's Office had failed to reveal Hoehn's prior inconsistent statements at the first trial. Not only did Smith County fail to disclose exculpatory evidence pursuant to *Brady v. Maryland,* 373 U.S. 8, 83 S. Ct. 1194 (1963); *Moore v. Illinois*, 408 U.S. 786, 92 S. Ct. 2562 (1972); and *Kyles v. Whitney*, 115 S. Ct. 1555 (1995), the District Attorney himself took affirmative steps to mislead Respondent's counsel by lying to counsel that Robert Hoehn had not made any prior statements. (Writ Hearing Vol. 1, 11/19/92, 120).

The Smith County District Attorney's Office was finally forced to produce the exculpatory evidence in 1992, fourteen years after Hoehn had testified. Because the State's key witness had long since died, Respondent's counsel were forever denied the opportunity to confront Robert Hoehn with his multiple prior inconsistent statements.

The Smith County District Attorney's Office admitted, when they finally produced the exculpatory evidence years after Robert Hoehn's death, that Hoehn's prior inconsistent statements had been in the possession of the prosecutors before Respondent's first trial in 1978, that the statements directly contradicted Hoehn's sworn testimony at trial and that the statements were necessary for the defense to properly cross-examine and impeach Hoehn. (Writ Hearing Vol. 1, 11/19/92, 120-121).

REASONS FOR DENYING THE WRIT

I.

THERE ARE NO SPECIAL AND IMPORTANT REASONS TO GRANT THE WRIT.

Smith County has engaged in a classic example of *ignoratio elenchi* by purposely mischaracterizing the opinion by the Texas Court of Criminal Appeals. The Texas Court found a violation of the Due Process Clause of the United States Constitution, as well as the Due Course of Law provision of the Texas Constitution, under the particular facts of this case — "under these circumstances." *Cook v. State*, 940 S.W. 2d at 627. Yet Smith County accuses the Texas Court of Criminal Appeals of having issued a global ruling that "significantly changed the interpretation of the law . . . so that every *Brady* violation will result in a bar to retrial or the exclusion of inculpatory evidence." Petition for Writ of Certiorari, page 3. Smith County's alarmist claim that every *Brady* violation will now result in a bar to retrial is wholly imaginary. Not only did the Texas Court of Criminal Appeals decline to bar a retrial, the Court specifically ruled that a retrial is constitutionally permissible:

> We do find that, consistent with constitutional principles, a retrial of Respondent is possible, assuming, of course, the State elects to retry him.

Cook v. State, 940 S.W. 2d at 627.

The Texas Court of Criminal Appeals did not create new law that every *Brady* violation now automatically results in a bar to retrial. On the contrary, the Texas Court narrowly held that "under these circumstances" — the prosecution's failure

to reveal Robert Hoehn's prior inconsistent statements, coupled with the fact that Hoehn had died before the *Brady* material was finally disclosed, and was therefore not subject to confrontation — barred the use of Hoehn's testimony at any retrial.

CONCLUSION

Hearsay testimony may not be admitted under the former testimony exception unless the testimony is "marked with such trustworthiness" and has an "indicia of reliability." *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 2539 (1980). As the Texas Court of Criminal Appeals acknowledged, Robert Hoehn's "highly prejudicial testimony" was "directly contradicted by Hoehn's earlier sworn testimony before the grand jury" and his other pre-trial statements. *Cook v. State*, 940 S.W. 2d at 626. Phrased another way, Hoehn either committed perjury before the jury at trial or perjury before the grand jury. Because prosecutorial misconduct denied Respondent the opportunity to confront Hoehn with his direct contradictions, Respondent is now forever barred from exposing whether Hoehn lied before the jury at trial, or whether he lied to the police, the District Attorney's Office and the grand jury. It is known, however, that Hoehn did lie and was a liar. Hoehn's trial testimony, never adequately investigated by cross-examination, because the Smith County District Attorney had lied about the existence of Hoehn's prior inconsistent statements, is therefore far from trustworthy and reliable.

Because Robert Hoehn died before the Smith County prosecutor's finally produced Hoehn's prior inconsistent statements in 1992 — fourteen years after Hoehn had testified — we are left with only speculation as to why Hoehn lied, on which occasion he lied, and what his reaction might have been had defense counsel had the opportunity to confront Hoehn with

his lies. We must not lose sight, however, that the prosecutorial misconduct of the Smith County District Attorney's office has caused this frustrating reality. Had the Smith County prosecutors obeyed the law and not intentionally suppressed Hoehn's prior inconsistent statements, and had the District Attorney himself not affirmatively lied when original defense counsel had asked if Hoehn had made any prior statements and the District Attorney falsely replied "none", Respondent's trial counsel would have had the opportunity to confront Hoehn and perhaps establish the truth, or uncover additional lies.

Respondent, Kerry Max Cook, respectfully prays that the Court refuse to grant Smith County's Petition for Writ of Certiorari.

Respectfully submitted,

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